Supreme Court, U.S.
FILED
APR 23 2001
CLERK

No. 00-1341

In The Supreme Court Of The United States

KATURIA SMITH, ANGELA ROCH, AND MICHAEL PYLE,
PETITIONERS,
v.
UNIVERSITY OF WASHINGTON SCHOOL OF LAW,
WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, AND
RICHARD KUMMERT, *RESPONDENTS.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

PERKINS COIE LLP
DAVID J. BURMAN*
Sp. Assist. Attorney General
JAMES F. WILLIAMS
MICHAEL W. HOGE
TINA S. GARVEY
1201 3RD AVENUE
SUITE 4800
SEATTLE, WA 98101-3099
(206) 583-8888

BENNETT BIGELOW & LEEDOM
MICHAEL MADDEN
Sp. Assist. Attorney General
999 3RD AVENUE SUITE 2150
SEATTLE, WA 98104
(206) 622-5511

CHRISTINE O. GREGOIRE
Attorney General
WILLIAM BERGGREN COLLINS
Sr. Assistant Attorney General
1125 Washington Street SE
OLYMPIA, WA 98504-0100
(206) 753-6245

Attorneys for Respondents
**Counsel of Record*

APRIL 23, 2001

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT 2

1. PETITIONERS' CHALLENGE TO THE LAW SCHOOL'S ADMISSIONS POLICY 2

2. 1997 MOTIONS IN THE DISTRICT COURT 4

3. INITIATIVE 200 PASSED BY WASHINGTON VOTERS IN NOVEMBER 1998 6

4. 1999 MOTIONS IN THE DISTRICT COURT 6

5. CERTIFICATION BY THE DISTRICT COURT 8

6. PROCEEDINGS IN THE COURT OF APPEALS 9

REASONS FOR DENYING THE WRIT 10

1. THE *BAKKE* QUESTION IS HYPOTHETICAL AND PREMATURE IN THE CONTEXT OF THIS CASE 10

2. THE SECOND QUESTION IS NOT RIPE FOR REVIEW 12

3. THE COURT OF APPEALS DECISION DOES NOT CREATE A SIGNIFICANT CONFLICT 13

4. THE COURT SHOULD RESOLVE ON A COMPLETE RECORD IMPORTANT ISSUES CONCERNING THE VALUE OF DIVERSITY AND THE USE OF RACE IN ADMISSIONS 15

5. THE "SUBSIDIARY QUESTIONS" DO NOT WARRANT REVIEW 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood
608 A.2d 914 (1992),
aff'd, 625 A.2d 483 (1993) 13

Brewer v. West Irondequoit Cent. Sch. Dist.
212 F.3d 738 (2d Cir. 2000) 15

Buchwald v. Univ. of N.M. Sch. of Med.
159 F.3d 487 (10th Cir. 1998) 13

Davis v. Halpern
768 F. Supp. 968 (E.D.N.Y. 1991) 13

Davis v. Monroe County Bd. of Educ.
526 U.S. 629 (1999) 12

DeFunis v. Odegaard
416 U.S. 312 (1974) 2

DeRonde v. Regents of the Univ. of Cal.
625 P.2d 220 (1981) 13

Eisenberg ex rel. v. Montgomery County Pub. Schs.
197 F.3d 123 (4th Cir. 1999),
cert. denied, 120 S. Ct. 1420 (2000) 15

Elder v. Holloway
510 U.S. 510 (1994) 11

Gebser v. Lago Vista Indep. Sch. Dist.
524 U.S. 274 (1998) 12

Gratz v. Bollinger
122 F. Supp. 2d 811 (E.D. Mich. 2000) 2

Grutter v. Bollinger
2001 U.S. Dist. LEXIS 3256 (E.D. Mich. Mar. 27, 2001) 2

Hopwood v. Texas
236 F.3d 256 (5th Cir. 2000) 21

Hunter v. Bd. of Regents of the Univ. of California
190 F.3d 1061 (9th Cir. 1999), *cert. denid*, 121 S. Ct. 186 (2000) 15

J.E.B. v. Alabama ex rel. T.B.
511 U.S. 127 (1994) 16

Johnson v. Bd. of Regents of the Univ. Sys. of Georgia
106 F. Supp. 2d 1362 (S.D. Ga. 2000) 2

Jones ex rel. Michele v. Bd. of Educ.
632 F. Supp. 1319 (E.D.N.Y. 1986) 13

Mallory v. Harkness
895 F. Supp. 1556 (S.D. Fla. 1995) 13

Marks v. United States
430 U.S. 188 (1977) 1, 21, 22

Martin v. Charlotte-Mecklenburg Bd. of Educ.
475 F. Supp. 1318 (W.D.N.C. 1979), *aff'd*, 626 F.2d 1165 (4th Cir. 1980) 13

McDonald v. Hogness
598 P.2d 707 (1979) 13

McLaughlin v. Boston Sch. Comm.
938 F. Supp. 1001 (D. Mass. 1996) 13

Metro Broad., Inc. v. FCC
497 U.S. 547 (1990) 14

Planned Parenthood v. Casey
505 U.S. 833 (1992) 15, 16

Regents of the Univ. of California v. Bakke
438 U.S. 265 (1978) ..... passim

Roberts v. United States Jaycees
468 U.S. 609 (1984) 19

Smith v. Univ. of Wash. Law Sch.
233 F.3d 1188 (9th Cir. 2000) 10, 14

Smith v. Univ. of Washington Law Sch.
2 F. Supp. 2d 1324 (W.D. Wash. 1998) ..... passim

Talbert v. Richmond
648 F.2d 925 (4th Cir. 1981) 13

Texas v. Hopwood
78 F.3d 932 (5th Cir.),
cert. denied, 518 U.S. 1033 (1996) ..... passim

Texas v. Lesage
528 U.S. 18 (1999) 11, 12

Tuttle v. Arlington County Sch. Bd.
195 F.3d 698 (4th Cir. 1999),
cert. dismissed, 120 S. Ct. 1552 (2000) 15

United States v. Brown Univ.
5 F.3d 658 (3d Cir. 1993) 13

Univ. & Cmty. Coll. Sys. of Nev. v. Farmer
930 P.2d 730 (1997)..... 13

UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.
774 F. Supp. 1163 (E.D. Wis. 1991)..... 13

Uzzell v. Friday
592 F. Supp. 1502 (M.D.N.C. 1984) 13

Washington v. Seattle Sch. Dist. 1
458 U.S. 457 (1982)..... 18

Wessmann v. Gittens
160 F.3d 790 (1st Cir. 1998)..... 15

Wittmer v. Peters
87 F.3d 916 (7th Cir. 1996),
cert. denied, 519 U.S. 1111 (1997)..... 15

Wygant v. Jackson Bd. of Educ.
476 U.S. 267 (1986)..... 19

Statutes

28 U.S.C. § 1292(b) 9

42 U.S.C. § 1981 ..... 1, 3, 4, 10

42 U.S.C. § 1983 ..... 1, 3, 4

42 U.S.C. § 2000(d)
Title VI, Civil Rights Act of 1964 ..... passim

Initiative 200
(codified as Wash. Rev. Code § 49.60.400 (2000))..... 6, 10

Other Authorities

44 Fed. Reg. 58509 (1979) 5

Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*,
43 UCLA L. Rev. 1745 (1996) 14

Gabriel J. Chinn, *Bakke To The Wall: The Crisis Of Bakkean Diversity*,
4 Wm. & Mary Bill of Rts. J. 881 (1996) 14

Goodwin Liu, *Affirmative Action In Higher Education: The DiversityRationale And The Compelling Interest Test*,
33 Harv. C.R.-C.L. L. Rev. 381 (1998) 14

Note, *An Evidentiary Framework For Diversity As A Compelling Interest In Higher Education*,
109 Harv. L. Rev. 1357 (1996) 14

Paul Brest & Miranda Oshige, *Affirmative Action For Whom?*,
47 Stan. L. Rev. 855 (1995) 15

Randall Kennedy, *Persuasion And Distrust: A Comment On The Affirmative Action Debate*,
99 Harv. L. Rev. 1327 (1996) 15

Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*,
67 Cal. L. Rev. 69 (1979) 14

Vincent Blasi, *Bakke As Precedent*,
67 Cal. L. Rev. 21 (1979) 14

Rules

Fed. R. Civ. P. 23(b)(2) 4

Fed. R. Civ. P. 23(b)(3) 4

Fed. R. Civ. P. 23(f) 9

Regulations

45 C.F.R. § 80.5(j) 5

INTRODUCTION

The University of Washington School of Law and the individual respondents (collectively, the Law School) respectfully request that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In the case's current interlocutory posture, the first question presented by petitioners–whether "diversity" is a compelling interest in admissions to higher educational institutions–amounts to no more than a request for an advisory opinion. Due to a change in state law in 1998, the Law School was forced to abandon the challenged admission policy, thereby mooting all injunctive, declaratory, and class claims. Pet. at 7a-12a. As to the remaining claims by the individual plaintiffs for damages under 42 U.S.C. § 1983, petitioners long ago conceded that respondents were entitled to qualified immunity if the Law School followed Justice Powell's opinion in *Bakke*.[1] *Smith v. Univ. of Washington Law Sch.*, 2 F. Supp. 2d 1324, 1334 n.4 (W.D. Wash. 1998).

The second question presented is whether the standard of liability applicable to petitioners' claims for damages under 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), differs from that under § 1983. This question was neither argued to nor decided by the Court of Appeals, and the petition fails to even address it. Similarly, the laundry list of "related issues" identified at pages 21-28 of the petition is not, with the single exception of application of *Marks*[2] to *Bakke*, properly presented in this case.

Therefore, while the question of "[w]hether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admission process is an issue of great national importance", resolution of this issue

---

[1] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

[2] *Marks v. United States*, 430 U.S. 188 (1977).

"must await a final judgment on a program genuinely in controversy". *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of certiorari).[3]

STATEMENT

1. PETITIONERS' CHALLENGE TO THE LAW SCHOOL'S ADMISSIONS POLICY

The University of Washington School of Law is a national law school, attracting students from across the country and the world.[4] It attracts far more applicants than it can admit. Like most other law schools, it long ago concluded that having a diverse student body, consisting of persons with different backgrounds and experiences, enhances the educational experience for all students and produces lawyers better equipped to serve the needs of their clients and community. *See DeFunis v. Odegaard*, 416 U.S. 312, 324 (1974) (Douglas, J., dissenting).

---

[3] Three recent district court decisions have addressed the diversity question in the context of higher education. In *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000), the court agreed with the Ninth Circuit's analysis that diversity constitutes a compelling government interest and partially upheld the University of Michigan's undergraduate admissions program against a narrow tailoring challenge. However, another judge of the same court has reached a contrary conclusion with respect to Michigan's law school. *Grutter v. Bollinger*, 2001 U.S. Dist. LEXIS 3256 (E.D. Mich. Mar. 27, 2001). The *Gratz* and *Grutter* cases are now on expedited appeal to the Sixth Circuit, which has scheduled argument in its October term. In *Johnson v. Board of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), the court held that diversity is not a compelling government interest. *Johnson* is on appeal to the Eleventh Circuit.

[4] The Law School, which is consistently ranked among the top 25 schools nationally, attracts applicants from throughout the United States, not just the State of Washington, which petitioners misleadingly use for their statistical comparisons. Decl. Richard Kummert, 12/23/97, Ex. 1 at 1-6.

In 1989, the Law School amended its admission policy with the express purpose of bringing it into compliance with Justice Powell's opinion in *Bakke*. Statement Michael Rosman, 1/20/98, Ex. 8 (Admissions Committee Report). Under the 1989 admissions policy, the Law School used race as one of many "plus factors" to create a diverse student body. Petitioners' lawsuit challenges this policy and the practices adopted to implement it. Consolidated Am. Compl., filed 7/10/97.

The three petitioners, Katuria Smith, Angela Rock and Michael Pyle, were among the thousands of applicants that the Law School did not select to fill approximately 165 openings in each of its entering classes for the years 1994-1996.[5] Petitioners brought this suit in July 1997, claiming that the Law School discriminated against them on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983. Petitioners also claimed a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Consolidated Am. Compl., filed 7/10/97.

When the action was filed in 1997, petitioners Smith and Rock had successfully completed law school elsewhere. Other law schools had admitted petitioner Pyle, but he chose not to attend. The Law School admitted Pyle when he reapplied in 1999, but he chose not to attend. Pet. at 9.

---

[5] Petitioners' recitation of the merits of their individual applications is irrelevant to the issues petitioners seek to bring before the Court. Below, however, respondents presented evidence that each of the petitioners' applications showed marginal qualifications. Aff. Richard Kummert, 10/31/97, at 3-5. The record also reflects that petitioner Smith's personal history (Pet. at 6), which she claims reflects forms of non-racial diversity, was not stated in her application. Statement Rosman, Ex. 4 (Katuria Smith Application File). Petitioner Rock's claim that she had worked as a lifeguard at a pool in a "gang-infested ghetto area of Spokane" (Pet. at 8.) is ludicrous for anyone (like the admissions officers who reviewed her application) familiar with the demographics of that city.

2. 1997 MOTIONS IN THE DISTRICT COURT

In 1997, both parties made motions in the district court.

Class Certification

Petitioners sought certification of a class for declaratory and injunctive relief under Federal Rule of Civil Procedure (Rule) 23(b)(2) and, alternatively, a damages class under Rule 23(b)(3). Mem. Law Supp. Pl.'s Mot. Class Certification, filed 9/11/97, at 1. The district court granted class certification under Rule 23(b)(2) only. *Smith*, 2 F. Supp. 2d at 1344-45; Order, filed 4/22/98, at 2, 34 (certifying class action) .

Qualified Immunity

The Law School moved for summary judgment on petitioners' damage claims, arguing that the individual respondents were entitled to qualified immunity under 42 U.S.C. §§ 1981 and 1983, because their admissions practices were consistent with Justice Powell's opinion in *Bakke*. In response, petitioners conceded that Justice Powell's opinion was the proper standard for determining respondents' entitlement to qualified immunity. Mem. Law Opp'n Defs.' Partial Summ. J. Mot., filed 1/20/98, at 16 (qualified immunity).

Although the district court denied the Law School's motion (*Smith,* 2 F. Supp. 2d at 1335-37; Order, filed 4/22/98, at 9-20 (certifying class action)), the court noted petitioners' stipulation and held that *Bakke* was the relevant standard by which to judge whether the individual respondents had violated clearly established law under §§ 1981 and 1983. *Smith*, 2 F. Supp 2d at 1331 n.2, 1334, & n.4. Denial of the Law School's motion was based on the court's finding that there were disputed issues of fact, primarily with respect to whether respondents used race as a determinative rather than a "plus" factor in the admissions process. *Id.* at 1334.

Damages Under Title VI

The Law School also moved for summary judgment on petitioners' damages claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). The Law School argued that it could not be liable for damages under Title VI, because liability under Spending Clause statutes can only be imposed for violations of conditions that the federal government clearly articulates in advance of the receipt of funds. Because the government consistently advised colleges and universities that it was permissible to consider race in the manner described by Justice Powell in *Bakke*[6], the Law School contended that it did not breach its funding contract. *Smith*, 2 F. Supp. 2d at 1337-38. The district court indicated its agreement with the proposition that the Law School could not be held liable for damages under Title VI if it complied with federal regulatory guidance, but denied summary judgment based on the same disputed issues of fact it found in connection with the Law School's claim of qualified immunity.

---

[6] Title VI regulations provide that federally funded educational institutions "may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups . . . [I]t may establish special recruitment policies . . . and take other steps to provide that group with more adequate service". 45 C.F.R. § 80.5(j). In 1979, the Department of Education, Office of Civil Rights (OCR) issued a Policy Interpretation, which specifically encourages recipients of federal funds to adopt voluntary affirmative action approaches consistent with *Bakke*, including consideration of "race, color, or national origin as a positive factor, with other factors . . . in selecting from among qualified applicants". 44 Fed. Reg. 58509 (1979). In its oversight of Title VI funding recipients, the federal government has authorized and continued to encourage universities to consider race as a "plus factor" in making admissions decisions. Decl. Michael Madden Supp. Mot. Partial Summ. J., filed 1/16/98; Resp. Br. Def. Univ. Wash. Supp. Mot. Partial Summ. J., filed 3/5/98.

3. INITIATIVE 200 PASSED BY WASHINGTON VOTERS IN NOVEMBER 1998

In November 1998, as the case was being readied for trial, the voters of Washington passed Initiative 200, which provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[7] The initiative's proponents focused on the Law School. Following the initiative's passage, the President of the University of Washington immediately suspended race-conscious admissions, and the Law School rescinded the 1989 admissions policy, replacing it with a policy that does not refer to race. Mot. Dismiss Inj. & Decl. Claims Moot, filed 11/19/98, Ex. C (Statement of Univ. of Wash. President Richard L. McCormick on I-200).

4. 1999 MOTIONS IN THE DISTRICT COURT

After the passage of Initiative 200, the parties filed several dispositive motions.

Mootness As A Result Of Initiative 200

Based on the passage of Initiative 200, the Law School moved to decertify the class for declaratory and injunctive relief as moot and to dismiss those claims. The district court granted this motion. Order, filed 2/10/99, at 1, 11-13 (dismissing claims for equitable relief). The Court of Appeals affirmed, and petitioners have not sought certiorari with respect to this ruling.

Diversity As A Compelling Interest

Petitioners moved for partial summary judgment, asserting that diversity in higher education can never be a compelling interest as a matter of law. Mot. Pl. Partial Summ. J., filed 12/27/98. In response and in support of the proposition

---

[7] Initiative 200 is codified as Wash. Rev. Code § 49.60.400 (2000).

that diversity is a compelling interest, the Law School presented extensive expert and lay evidence in support of the educational benefits of diversity. This evidence consisted of the testimony of education experts, law deans and professors, students of various races, admissions officials, judges, and leaders of the bar. *See infra* notes 15-17. Petitioners made no effort to rebut this evidence.

At the same time, the Law School moved for summary judgment on grounds that its admissions policy fully complied with Justice's Powell's *Bakke* opinion. The Law School presented evidence showing that its admissions process was consistent with the principles of educational diversity approved in *Bakke*, i.e., that the Law School was attempting to do more than simply increase the number of minority students and that it gave significant weight to diversity factors other than race. Decl. Sandra Madrid, filed 12/17/98. This evidence showed that the Law School admitted both whites and minorities whose scores alone would not have led to admission. The Law School admitted them on the basis of their outstanding or unusual talents, backgrounds, and skills, such as second languages, athletic achievement, career goals, public service, experience abroad, and possession of an advanced degree. *Id.*; Statement Rosman, filed 1/20/98 (Qual. Imm. Mot.), Ex. 7 (Law School Policy Statement re Admis.). *Cf. Bakke*, 438 U.S. at 317.

Because nonracial diversity factors weighed heavily in the admissions calculus, whites were not excluded from consideration for admission at any score level because of their race. Decl. Richard Startz, filed 12/17/98, Ex. 1(a) (Percent of Applicants Admitted 94-8 by Ethnicity). Indeed, more whites than any other racial group were admitted with scores below the mean. Decl. Madden Supp. Mot. Summ. J., filed 12/17/98, Ex. 4. The evidence also showed that the Law School's use of race to foster diversity had a minimal effect on white applicants' chances for admission. Under a "race-neutral" system, the average white would have had an 85 percent chance of being rejected, 5 percent less than under the

challenged system. Decl. Startz, Ex. 2 (Analysis of Eliminating Ethnicity as a Plus Factor). The unrebutted evidence also showed that race was not given undue weight, counting only slightly more than being a Washington resident, and less than possession of an advanced degree. Decl. Startz.

The Law School also presented evidence that consideration of race was necessary to include the life experiences and perspectives of racial minorities among the forms of diversity represented in the student body. Decl. Madden, filed 12/17/98, Ex. 1. Racial minorities constituted about 28 percent of those applying to the Law School, 31 percent of those admitted, and 32 percent of those enrolled. Decl. Startz, filed 12/17/98, Ex. 1 (summary statistics for *Smith*, 2 F. Supp. 2d 1324). Under a race-neutral system, and assuming that all other conditions remained the same, minority enrollment would have dropped to 13 percent, most of whom would have been Asian Americans. (The experience after Initiative 200 fulfilled this prediction.) With an average entering class size of 173, fewer than two African Americans, five Hispanics, and two Native Americans would have been admitted each year. Startz, Ex. 2 (Analysis of Eliminating Ethnicity as a Plus Factor).

The district court denied petitioners' motion for partial summary judgment, reasoning that Justice Powell's opinion in *Bakke* established that educational diversity could be a compelling government interest. The district court also denied the Law School's motion, citing the same potential factual disputes as it had identified in its earlier decision. Order, filed 2/12/99 (Den. Summ. J. Mots.).

5. CERTIFICATION BY THE DISTRICT COURT

After ruling on the parties' 1999 motions, the district court certified its denial of petitioners' motion for appeal under

28 U.S.C. § 1292(b).[8] The district court certified two questions:

> "(1) Whether educational diversity is a compelling governmental interest that meets the requirements of "strict scrutiny" for race-conscious measures under the Fourteenth Amendment to the United States Constitution;
>
> "(2) Whether race may be considered only for remedial purposes." Pet. at 27a.

The district court did not certify any question related to its earlier ruling that the Law School could not be held liable for damages under Title VI if it complied with federal regulatory guidance. After certifying the case, the district court stayed further proceedings pending resolution of that appeal. Order, filed 2/22/99 (certifying order pursuant to 28 U.S.C. § 1292(b)).

6. PROCEEDINGS IN THE COURT OF APPEALS

The Court of Appeals granted leave to appeal, and petitioners reiterated their arguments that diversity can never be a compelling interest and use of race should be reserved exclusively for remedial purposes. The Court of Appeals rejected petitioners' arguments and affirmed the district court in all respects.

---

[8] Petitioners mistakenly claim that respondents stipulated that the *Bakke* issue is a controlling question of law for purposes of 28 U.S.C. § 1292(b). Pet. at 11. Respondents' only stipulations were to the district court's entry of order certifying certain questions for immediate appeal and that they would not oppose petitions for leave to appeal under § 1292(b) and Rule 23(f). Pet. 26a-27a. At the time of this stipulation, petitioner Pyle had a live claim for prospective relief, because he had not yet been admitted to the Law School. Additionally, there was a possibility that the dismissal of the injunctive and class claims could be reversed, thereby reviving additional prospective issues. However, after Mr. Pyle was admitted, the Law School, as well as the United States as amici, argued that, if the dismissal of the injunctive and class claims was upheld, it was unnecessary to reach the *Bakke* issue. Appellee's Br. at 30; Br. United States at 12.

The Court of Appeals did not address the issues discussed in the district court's first summary judgment ruling concerning the availability of qualified immunity as a defense to claims under 42 U.S.C. § 1981; or whether the government's instructions to colleges and universities, that they could consider race in the manner described by Justice Powell, constitute grounds for a qualified immunity defense to Title VI damages liability.[9]

REASONS FOR DENYING THE WRIT

1. THE *BAKKE* QUESTION IS HYPOTHETICAL AND PREMATURE IN THE CONTEXT OF THIS CASE

Petitioners' first question asks whether diversity can ever be a compelling state interest to justify the use of race as a factor in the law school admissions process. In this case, petitioners' first question is both hypothetical and premature.

It is hypothetical because resolving the question will not impact the Court of Appeals remand of petitioners' individual damages claims to the district court. Petitioners have not challenged the Court of Appeals' holding that Initiative 200 rendered all claims for declaratory and injunctive relief moot. As the Ninth Circuit recognized, the district court "could give no relief of a prospective nature once the statute and its aftermath had accomplished all that a judgment could accomplish". Pet. at 8a; *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000).

A ruling by the Court on the first question will have no impact on the remand of petitioners' damages claims, as petitioners have conceded that Justice Powell's opinion in *Bakke* controls the individual respondent's qualified immunity

---

[9] Indeed, petitioners made only brief reference to the Title VI issue in their reply brief to the Court of Appeals, in response to the suggestion that it would be unnecessary to decide the *Bakke* issue if the court affirmed dismissal of the injunctive and class claims. Appellants' Reply Br. at 20.

defense. A change or clarification of the law at this point could not operate to deprive the individual respondents of qualified immunity, because that defense requires petitioners to show that respondents violated constitutional rights that were clearly established at the time of the challenged conduct. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Even if the Court were to hold that the interest in diversity can never be compelling, the case would still have to be remanded to the district court to resolve respondents' qualified immunity claims–in other words, to determine whether the Law School reasonably believed its challenged admissions policy fell within Justice Powell's *Bakke* opinion.

Consequently, petitioners are mistaken in their assertion that a trial on liability would be unnecessary if the Court were to reverse the Court of Appeals. Pet. at 21. Moreover, in addition to a trial on respondents' qualified immunity defense, petitioners must establish standing to recover damages by proving that they would have been admitted to the Law School under a race-neutral admissions system. *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam). The most petitioners can claim is to have raised factual disputes as to this issue, which must be resolved by a trial on the merits. Pretrial Order, filed 2/18/99. If, as is likely, the district court rules against petitioners on that issue, the court will have no reason to address, and should not address, the constitutional question.

In addition to being hypothetical, the *Bakke* question is also premature because there has been no ruling on whether the Law School's former program was narrowly tailored to serve a compelling interest. Indeed, that is the very issue to be decided on remand from the Ninth Circuit. In this respect, the posture of this case is similar to that of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), in which the Court denied the petition for a writ of certiorari. As the *Hopwood* plaintiffs stated in opposing certiorari in that case:

> "[T]he issue at the heart of the petition–the legal significance of Justice Powell's sentiments about

> 'diversity' in *Bakke*–is not squarely presented by this case. The Court should not grant certiorari review merely to affirm on the unremarkable ground that, assuming without deciding that 'diversity' is a compelling interest, [the Law School's] admissions program does not satisfy 'narrow tailoring.'" Brief For Cheryl Hopwood And Douglas Carvell at 15-16, *Hopwood v. Texas*, 518 U.S. 1033 (1996) (No. 95-1773).

As in *Hopwood*, this petition amounts to no more than a request for an advisory opinion. Br. Hopwood/Carvell at 3.

2. THE SECOND QUESTION IS NOT RIPE FOR REVIEW

Petitioners' second question asks whether an admissions system that uses race as a factor violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). This question is not ripe for review. The legal standard to find a violation of Title VI was not among the questions certified to the Court of Appeals by the district court, and petitioners did not argue this issue to the Court of Appeals. Consequently, the Court of Appeals did not resolve this issue–or even discuss it.[10]

The petition filed with this Court focuses exclusively on the first question and does not explain why the second question meets the standards of Rule 10. As with the first question, a reversal based on the second question presented would not eliminate a trial in the district court. Under *Lesage*, petitioners must first establish that they have standing by proving they

---

[10] In any event, the district court's unchallenged ruling is correct. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286-87 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 639-40 (1999), the Court held that liability for violation of Spending Clause provisions must be based on requirements that the federal government expressly articulated in advance. Here, rather than reflecting lack of clarity, the government's long-standing position has been that admissions systems modeled on that described by Justice Powell in *Bakke* are consistent with Title VI. Thus, the Law School would only be liable for damages if it was not following Justice Powell's opinion.

would have been admitted to the Law School under race-neutral criteria. In addition, because the district court has concluded that compliance with federal regulations insulates the Law School from Title VI damages, a trial would still be required to determine whether the Law School's admission policy was consistent with Justice Powell's opinion in *Bakke*, which those regulations incorporate.

3. THE COURT OF APPEALS DECISION DOES NOT CREATE A SIGNIFICANT CONFLICT

Petitioners are correct that the decision in this case conflicts with *Hopwood*, 78 F.3d at 944-45, where the Fifth Circuit held that Justice Powell's *Bakke* opinion is not binding precedent, that only remedial interests can justify race-conscience actions and that diversity in higher education, therefore, can never be a compelling government interest. However, conflicts with *Hopwood* are not new. Before *Hopwood*, federal[11] and state[12] courts alike regarded Justice Powell's opinion, and its recognition of diversity as a compelling government interest in the context of higher

---

[11] *See, e.g.*, *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998); *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993); *Talbert v. Richmond*, 648 F.2d 925, 928-29 (4th Cir. 1981); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1014-15 (D. Mass. 1996); *Mallory v. Harkness*, 895 F. Supp. 1556, 1560 (S.D. Fla. 1995); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1176 (E.D. Wis. 1991); *Davis v. Halpern*, 768 F. Supp. 968, 975-81 (E.D.N.Y. 1991); *Jones ex rel. Michele v. Bd. of Educ.*, 632 F. Supp. 1319, 1324 (E.D.N.Y. 1986); *Uzzell v. Friday*, 592 F. Supp. 1502, 1516, 1521 (M.D.N.C. 1984); *Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318, 1345 (W.D.N.C. 1979), *aff'd*, 626 F.2d 1165 (4th Cir. 1980).

[12] Three state supreme courts have also reached this conclusion. *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220 (1981); *Univ. & Cmty. Coll. Sys. of Nev. v. Farmer*, 930 P.2d 730, 734–35 (1997); *McDonald v. Hogness*, 598 P.2d 707 (1979). *See also Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 608 A.2d 914, 945 (1992), *aff'd*, 625 A.2d 483 (1993) ("The State's compelling interest in diversity in the public schools as a function of education cannot be seriously questioned.").

education, as controlling. The Court has, itself, treated Justice Powell's opinion as binding precedent. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990) ("[A] 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated.") (quoting *Bakke*, 438 U.S. at 311-13 (Powell, J.)), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).[13]

---

[13]In addition to judicial acceptance, many legal scholars have recognized Justice Powell's opinion as the holding of the *Bakke* Court. *See, e.g.*, Vincent Blasi, *Bakke As Precedent*, 67 Cal. L. Rev. 21, 30 (1979) ("The Powell opinion is, after all, the key to assessing the precedential significance of the *Bakke* decision."); Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 Cal. L. Rev. 69 (1979) ("[t]he actual 'ruling' in *Bakke*, stemming only from Justice Powell's tie breaking opinion, that race may be *a* factor but not *the* factor in admissions criteria of state universities, has acquired wide pragmatic appeal"); Note, *An Evidentiary Framework For Diversity As A Compelling Interest In Higher Education*, 109 Harv. L. Rev. 1357, 1358 (1996) ("Justice Powell's opinion in *Bakke* continues to be the guiding opinion for lower courts"); Goodwin Liu, *Affirmative Action In Higher Education: The Diversity Rationale And The Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381, 389 (1998) ("Over the past two decades, Justice Powell's articulation of the diversity rationale . . . has acquired several features of a stable precedent."); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1768 (1996) ("The Court . . . nowhere explicitly overruled *Bakke*, and so, under well established general principles, it clearly remains binding precedent for all lower courts, state and federal."). Petitioners cite one article as suggesting that "[m]any academics have also concluded that there is no rationale for the judgment in *Bakke*." Pet. at 18. The article in fact only says that "some" academics have questioned whether there is a holding and then states: "There is a strong argument, however, that there was a binding opinion", that of Justice Powell. Gabriel J. Chinn, *Bakke To The Wall: The Crisis Of Bakkean Diversity*, 4 Wm. & Mary Bill of Rts. J. 881, 923-24, 926 (1996). As the Court of Appeals correctly observed: "If the various opinions in *Bakke* mixed so many different colors that the result became rather muddy, that result was still clear enough to permit educators to rely upon the opinion that gave the decision its life and meaning." Pet. at 23a; *Smith*, 233 F.3d at 1200.

There has been no judicial stampede to adopt the Fifth Circuit's position. To the contrary, every circuit to consider the question has declined to adopt its position. When petitioned, the Court has denied certiorari in those cases, as it did in *Hopwood* itself.[14]

4. THE COURT SHOULD RESOLVE ON A COMPLETE RECORD IMPORTANT ISSUES CONCERNING THE VALUE OF DIVERSITY AND THE USE OF RACE IN ADMISSIONS

Based on decisions consistent with the Court of Appeals' holding in this case, educational institutions, students, and their parents have relied on *Bakke* as precedent for limited use of race in admissions. *See* Paul Brest & Miranda Oshige, *Affirmative Action For Whom?*, 47 Stan. L. Rev. 855, 858 (1995); Randall Kennedy, *Persuasion And Distrust: A Comment On The Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1329 (1996). Therefore, federal courts, and this Court in particular, have been careful not to take up the issue prematurely or, more generally, to upset settled constitutional expectations. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (O'Connor, Kennedy, Souter, JJ.) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. . . .

---

[14] *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 748 (2d Cir. 2000) ("the Fifth Circuit is the only circuit since *Bakke* to hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context"); *Eisenberg ex rel. v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130-31 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000) (assuming without deciding that diversity can be compelling); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000) (to the same effect); *Wessmann v. Gittens*, 160 F.3d 790, 795-96 (1st Cir. 1998) (to the same effect); *Hunter v. Bd. of Regents of the Univ. of California*, 190 F.3d 1061, 1064 n.6 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 186 (2000) (nonremedial interests can be compelling); *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (to the same effect).

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.").

Continued caution is appropriate in this case due to the limited record and the nature of the decision below. The only relevant issue decided by the Ninth Circuit is the precedential value of Justice Powell's opinion. At this point of the case, review of this issue is particularly ill-advised because petitioners relied on the argument that only remediation can be compelling, and did nothing to contest the important of diversity to education–particularly to legal education. They produced no evidence to counter the conclusions of the Law School faculty and of respondents' expert who stated that, "based upon my decades of academic work regarding racial matters in American education, ongoing surveys, and my own experience (including teaching in law schools), the distribution of experiences and opinions is vastly different for minority and white students" and "[p]roviding students with the educational benefits of racial and other forms of diversity is a core academic value".[15] Petitioners made no effort to contest the testimony of every type of participant in the educational process at the Law School–students of all colors, professors,

---

[15] Decl. Gary Orfield, filed 12/19/98. One's race and sex affect one's experiences, perspectives, and opinions, even if they do not dictate them. Differing experiences and perspectives are keys to robust debate. Justice O'Connor has noted with respect to gender that "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experiences will be relevant to his or her view of the case". *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring). The views affected by race and ethnicity are particularly relevant to legal education. Not only is race the subject of various statutes (such as in the employment, housing, and voting areas) and constitutional provisions (the Thirteenth and Fourteenth Amendments), but it is a critical factor in the operation of the legal system (such as in jury selection and sentencing).

admissions officials, and deans[16]–and of the "consumers" of the Law School's end product–bar association and law firm leaders and judges.[17]

This failure is particularly damning against the backdrop of this Court's own statements about diversity in law

---

[16] *See* Decl. Orfield; Decl. Randy Baldemore, filed 12/17/98; Decl. Jeff Younger, filed 2/17/98; Decl. Casey Trupin, filed 12/17/98; Decl. Amanda Paye, filed 12/17/98; Decl. Alice McCarty, filed 12/17/98 (declarations of students all describing contributions of diversity to law school education). *See also* Decl. Stewart Jay, filed 12/17/98 (member of the committee that drafted the 1989 admissions policy, noting that its purpose was to comply with *Bakke* and "to help us prepare better lawyers, whatever their color"); Decl. Sandra Madrid, filed 12/17/98 (Assistant Dean, noting that "[t]he belief that racial and other diversity benefits the educational process is sincerely held by most of the law school professors and deans with whom I have discussed the issue").

[17] Decl. M. Wayne Blair, filed 12/19/98 (President of the Washington State Bar Association describing the lack of diversity at the University of Washington Law School in 1965-68, and noting that "diversity in the classroom is an essential part of a quality legal education"); Decl. Mary Brucker, filed 12/17/98 (retired superior court judge and former prosecutor, describing negative effects of lack of diversity at the University of Washington Law School in 1955-58); Decl. Bradley Diggs, filed 12/17/98 (law firm leader and trustee of Legal Foundation of Washington); Decl. Jose Gaitan, filed 12/17/98 (adjunct faculty member, former prosecutor, law firm leader, vice chair of Seattle Chamber of Commerce, and chair of ABA's Commission on Opportunities for Minorities in the Profession); Decl. Daniel Gandara, filed 12/17/98 (law firm leader, pro tem judge, arbitrator, member of ABA House of Delegates, member of board of visitors of Seattle University School of Law, and former government lawyer); Decl. Lembhard Howell, filed 12/17/98 (law firm leader and former member of board of governors of Washington State Bar Association and of law school board of visitors); Decl. Charles Johnson, filed 12/17/98 (retired superior court judge); Decl. Colleen Kinerk, filed 12/17/98 (bar association and law firm leader and adjunct faculty member, noting lack of diversity while attending the Law School in 1974-77 and the improved educational process due to diversity while teaching there in 1994-98); Decl. Constance Proctor, filed 12/17/98 (bar association and law firm leader); Decl. Sharon Sakamoto, filed 12/17/98 (University trustee bar association, and law firm leader); Decl. Scott Smith filed 12/17/98 (former president of King County Bar Association).

school education. As Justice Powell noted in *Bakke*, the Court long ago specifically found that diversity was of paramount importance to *legal* education:

> "[E]ven at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 US at 634, 94 L. Ed. 114, 70 S. Ct. 848 the Court made a similar point with specific reference to legal education:
>
> > "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Bakke*, 438 U.S. at 313-14.

The Court has also approvingly noted Justice Powell's conclusion that students of all races "benefit from exposure to 'ethnic and racial diversity in the classroom'". *Washington v. Seattle Sch. Dist. 1*, 458 U.S. 457, 472-73 (1982) (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486 (1979) (Powell, J., dissenting)). The Law School's evidence confirms this wisdom, demonstrating that educational diversity benefits students of all races.

The logic of educational diversity, the consistent opinions of educational leaders and institutions, the conclusions of numerous courts, and the record in this case compel the conclusion that educational diversity is a compelling interest that justifies the Law School's plus-factor admissions process. Petitioners' failure to challenge these elements below makes this case unworthy of review by the Court. Petitioners are correct that the issue is important, and,

for that reason, it should not be reached unnecessarily or on an incomplete record.

5. THE "SUBSIDIARY QUESTIONS" DO NOT WARRANT REVIEW

Petitioners contend that there are "subsidiary questions that are encompassed by the primary question for review" (Pet. at 13) and that the Court could advise on these issues, even if it affirmed the judgment below. Pet. at 21. What petitioners fail to mention is that those issues were not preserved or decided below, nor does the petition explain why these subsidiary questions warrant review. Therefore, as petitioners' counsel said in opposing certiorari in *Hopwood*, "[p]etitioners are thus in the untenable position of asking this Court for an advisory opinion" concerning issues that were "not considered by either of the courts below". Brief For Cheryl Hopwood And Douglas Carvell at 3, *Hopwood v. Texas*, 518 U.S. 1033 (1996) (No. 95-1773).

Academic Freedom v. Diversity

Petitioners mischaracterize Justice Powell's reliance on principles of academic freedom (which support deference to academic judgment on the importance of diversity) to argue that his opinion would allow recognition of a First Amendment right to discriminate against racial minorities. Pet. at 22. Justice Powell's opinion says no such thing, and the Law School has certainly never asserted that academic freedom permits the systematic exclusion of students simply because of race.[18] Rather, the Law School's evidence (which must be

---

[18] The form of diversity articulated by Justice Powell is an inclusive one, which is consistent with the Fourteenth Amendment. *Bakke*, 438 U.S. at 318 (broad-based diversity rationale does not involve facial intent to discriminate). Exclusionary rationales, even if grounded in the First Amendment, are not entitled to absolute protection. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316-17 (1986) (Stevens, J., dissenting) (inclusion "accords with the Equal Protection Clause", exclusion does not).

taken as true at this stage) is that it has considered many varied kinds of diversity to achieve a richer, more inclusive educational experience for all students.

Question Of Fact Or Law

Neither side in this case has ever disputed the proposition that whether a particular asserted interest is compelling is a question of law. Rather, the issue to which petitioners seemingly allude is whether, in each case, an institution seeking to use race to foster diversity must shoulder a particular evidentiary burden. This issue is not presented here and certainly was not decided by the lower courts, because the Law School's evidence concerning the necessity and benefits of considering race to foster diversity went entirely unrebutted.

Educational Diversity v. Racial Diversity

Justice Powell's opinion distinguished between intellectual diversity, in which race plays a part and which he found to be compelling, and a narrower form of diversity, which considers only race and is not legitimate in the context of selective admissions. *Bakke*, 438 U.S. at 300 n.39. The Law School's evidence is that they have acted in accordance with this aspect of *Bakke*. Petitioners' representations that in some other cases some schools have argued that they should be allowed to consider only race, or to achieve a particular level of minority representation, have no relevance in this case.

Level of Scrutiny

In arguing that there is a dispute about the level of scrutiny applicable to race–conscious admissions policies designed to achieve diversity, petitioners are reaching to create an issue that was never argued to, let alone resolved by, the lower courts. Whatever position might have been preserved in a preliminary discovery response (Pet. at 25), the Law School consistently acknowledged, in its pleadings, that its

admissions program was subject to strict scrutiny. *Smith*, 2 F. Supp. 2d at 1334.

Standards For Determining Which Interests Are Compelling

Petitioners appear to be arguing that the Court should reach out and decide whether diversity can be compelling outside of the context of admissions to selective institutions of higher education. Petitioners never explain why, let alone how, the Court should do that in this case.

Societal Discrimination

Petitioners contend that, under the Court's Equal Protection jurisprudence, programs that consider race in allocating governmental benefits cannot be justified on the basis of past societal discrimination. Pet. at 27. However, they then argue that societal discrimination has occurred in the past and that it "no doubt" contributes to under-representation of racial minorities in higher education. Pet. at 28. Apparently, petitioners' argument is that if two motivations are possible, the valid one (educational diversity) cannot be pursued if it might have an effect similar to pursuing the improper one (remedying societal discrimination). No precedent or principle of logic is suggested to support this argument. It was not presented or decided below.

Application of Marks to Bakke

Petitioners do not seriously suggest that there is a conflict among the circuits in the application of *Marks* to *Bakke*[19], and they further argue that the Court should ignore the

---

[19] The Fifth Circuit did not engage in *Marks* analysis in its initial *Hopwood* decision. Rather, it simply concluded that an opinion authored by a single justice could not represent the holding of the Court. *Hopwood*, 78 F.3d at 944. In a more recent opinion issued by a different panel, that court noted its disagreement with the Ninth Circuit's analysis in this case, but again did not apply *Marks*. *Hopwood v. Texas*, 236 F.3d 256, 274 & n.66 (5th Cir. 2000). Rather, after stating that it was bound by the first panel's

Marks issue if it grants review. There is no issue worthy of the Court's review here.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

PERKINS COIE LLP
DAVID J. BURMAN*
Sp. Assist. Attorney General
JAMES F. WILLIAMS
MICHAEL W. HOGE
TINA S. GARVEY
1201 3RD AVENUE
SUITE 4800
SEATTLE, WA 98101-3099
(206) 583-8888

BENNETT BIGELOW & LEEDOM
MICHAEL MADDEN
Sp. Assist. Attorney General
999 3RD AVENUE SUITE 2150
SEATTLE, WA 98104
(206) 622-5511

CHRISTINE O. GREGOIRE
Attorney General
WILLIAM BERGGREN COLLINS
Sr. Assistant Attorney General
1125 Washington Street SE
OLYMPIA, WA 98504-0100
(206) 753-6245

Attorneys for Respondents
**Counsel of Record*

APRIL 23, 2001

---

opinion, it simply said that it did not believe that *Marks* was applicable to *Bakke*. *Id.*